IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 82-5096

KENNETH DARCELL QUINCE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Whether the refusal of the Supreme Court of Florida in a capital appeal to reweigh and independently evaluate the evidence adduced to establish the aggravating and mitigating circumstances as it is required to do under Florida's death penalty sentencing scheme denies a death-sentenced defendant due process of law and subjects him to cruel and unusual punishment?

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The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is reported as Quince v. State. 414 So.2d 185 (Fla. 1982). It is reproduced in the appendix as item 1. (A1-5)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on March 4, 1982. (A1-5) Petitioner filed a motion for rehearing (A6-11) which was denied on May 27, 1982. (A12) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 921.141, Florida Statutes (1979) which is set forth in the Appendix as item 7. (A19-20)

STATEMENT OF THE CASE

On January 17, 1980, a Volusia County, Florida grand jury returned an indictment charging the Petitioner with first degree murder of Francis Bowdoin, sexual battery of Frances Bowdoin, and burglary of an occupied dwelling with an assault therein of the residence of Frances Bowdoin, stemming from an incident on December 28, 1979. (R1) (A13) Following mental examinations which, according to the psychiatrists, revealed that Quince was legally sane at the time of the offense and was competent to stand trial, the petitioner entered pleas of guilty to Count I (first degree felony murder coommitted during the course of the sexual battery) and Count III (burglary). (R4,5-8,48-56;SR5-17) Count II, the Sexual battery charge, was dismissed by the court, upon motion by the defense, because it was the underlying felony of the felony murder. (R11-12,29;SR18-19) Pursuant to the plea negotiations, the petitioner waived a sentencing jury, the court to hold a hearing for aggravating and mitigating evidence to be presented to the judge alone. (SR6-8) (A2)

A penalty phase hearing before the judge alone was held on October 20, 1980. (T1-208) On October 21, 1981, based upon the evidence and arguments presented at the hearing and based upon the pre-sentence investigation, the trial court imposed a sentence of death upon Kenneth Quince. (R30;T210-212) (A14-15) In its findings of fact, the court found as aggravating circumstances: (d) the murder was committed while the defendant was committing rape; (f) the murder was committed for pecuniary gain; and (h) the murder was especially heinous, atrocious, or cruel because it involved a strangulation during a burglary and sexual battery and because "while the deceased was lying on the floor, presumably dead or unconscious, the Defendant stepped on her stomach." (R18-19) (A2,16-17) Although giving it little weight, the trial court found the existence of mitigating factor (f), the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R19-20) (A2,17-18) The trial

court rejected (a) lack of a significant prior criminal history based upon the defendant's juvenile charges (the most recent of which was five years old), and (g) the defendant's age of twenty years old as mitigating factors. (R19-20,25) (A2,17-18)

The Supreme Court of Florida affirmed the petitioner's convictions and sentence in the judgment now before this Court. (A1-5)

On December 30, 1979, Detective Larry Lewis was dispatched to a house in Daytona Beach regarding a suspicious death. (T11) Upon arriving at the scene, he found the body of Frances Bowdoin, age 82, lying on the floor of her bedroom. (R12-13) (A2) The detective observed dried blood coming from the deceased's nose, burises on her forearm, a bruise under her ear, and a small abrasion on her pelvic area. (T14,15,24-26) (A2)

The medical examiner later determined that the cause of death was suffocation by strangulation. (T90,92) (A2) Dr. Botting also noted two lacerations on the victim's head which could have been caused either by a sharp-edged instrument or by the sharp edge of furniture on which she may have fallen. (T80-81) These lacerations would have been sufficient to cause unconsciousness. (T91) Because of a bruise to the vaginal area of the victim, the medical examiner concluded that the sexual assault occurred prior to death, but the doctor could not opine whether the victim was conscious or unconscious at the time. (T91,92) (A2) At the scene, the detective had obtained several latent fingerprints from the window area which he had concluded was the point of entry of the intruder. (T27) The detective later compared the latent prints with those of the suspect, Kenneth Quince. (T28,35) Detective Lewis made a positive comparison. (T28,35)

On the basis of this fingerprint identification, Detective Lewis arrested Quince at his home, approximately two blocks from the Bowdoin residence. (T35-36) (A2) Quince was taken to the police headquarters, where he signed a waiver of his

constitutional rights. (T36) After the officer explained to Quince that the arrest was in reference to a burglary, the petitioner denied knowledge of the incident. (T36-37) (A2)

The detective asked Quince if he knew where the house in question was, the defendant responding that he had cut the yard for the lady five or six years ago. (T42) After repeated questioning as to whether the petitioner had been there more recently, Quince finally told the detective that he had been at the house. (T43) (A2) Quince told Detective Lewis that he had burglarized the house, believing no one to be home. (T44) While inside looking for valuables, Quince told the detective, Frances Bowdoin came to the bedroom door and the two spotted each other. (T44) The victim closed her bedroom door and Quince, after trying unsuccessfully a couple of times, managed to force the door open. (T44) The force of the opening door knocked Ms. Bowdoin to the floor. (T44) She stood back up and started to scream, whereupon the petitioner, trying to quiet her, grabbed her by the throat, shook her for a while, and pushed her to the floor. (T44) The petitioner continued to look for valuables, taking a tape player, a radio, and a ring which he later pawned at three pawn shops. (T44,51) Detective Lewis later recovered these items at the pawn shops. (T45) When the petitioner was running through the house to leave, he stepped on the deceased's stomach. (T51)

Detective Lewis questioned the petitioner concerning a sexual assault which the police suspected had occurred. (T45-46) Quince denied that any sexual battery had occurred, but, a month later, after the detective confronted him with laboratory test results, the petitioner admitted with some embarrassment to the sexual battery, without giving any further details. (T51-53,57-58) (A2) (Quince later told psychiatrists that, after pushing the deceased to the floor, and after she was unconscious, her nightgown rode up around her waist, and, becoming sexually excited, he raped her.) (R54)

Dr. Ann McMillan, a psychologist who had been appointed by the court to examine Quince specifically for the purpose of determining whether any mental mitigating factors were present, testified that Quince suffered from borderline mental retardation and had severe specific learning disabilities and impairment. (R57;T144) Dr. McMillan told the court that the petitioner had a significantly lower mental age and would act more like an eleven year old than an adult. (T147) (A2) Quince, who had a jugment disability and was unable to perceive the consequences of his actions, merely reacted to the circumstances of the instant situation, rather than acting through step-by-step planning. (T144,147-149) The homicide and sexual battery, therefore, were committed by a defendant whose capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T144-147) (A2)

The other psychiatrists, all but one of whom were appointed solely to determine Quince's competency to stand trial and sanity, agreed that Quince was of below normal intelligence, in the "dull-normal" range, or borderline mentally retarded. (R54;T111,128-129,157-158) (A2) not having performed any intelligence or personality tests on the defendant, they opined that the mitigating factor of impaired capacity was not present. (T113-115,158,164-165) Dr. Stern, however, stated that Quince "was not functioning with all his marbles" and Quince's borderline intelligence, could in itself, constitute somewhat of a mental impairment. (T158,162-163) Dr. Rossario's report indicates that the petitioner's judgment is "markedly impaired." (R55)

During the penalty phase hearing the prosecutor elicited from Detective Lewis, over defense counsel's initial objection, that, in Lewis' opinion, the petitioner exhibited no remorse. (T56) (A4) Detective Lewis did admit, however, that he had never asked Quince how he felt about the incident. (T57)

Furthermore, in the pre-sentence investigation, Quince was quoted as saying, "I do have feelings about what happened but it's too late now to say anything more." (R24)

Also during the penalty phase hearing, the trial court initiated questioning about the prospects of rehabilitation for the defendant. (R148) (A4) Dr. McMillan stated that Quince, due to his mental condition, would require lifelong supervision. (T148) Dr. Stern testified for the defense that Quince could be rehabilitated. (T165)

The pre-sentence investigation revealed that the petitioner was part of a very large family, having seven living brothers and sisters. (R25) Quince lived with his mother, a custodian at a school, and four sisters. (R26) Quince's father died in an automobile accident when Quince was five years old. (R25) Quince attended school through the tenth grade, receiving very poor grades. (R26,54;SR10) The petitioner admitted in the pre-sentence investigation and to the psychiatrists that he drank and smoked marijuana heavily, including the day of the offense. (R26,54,55) Quince began drinking when he was thirteen years old and began the use of drugs at age fifteen. (R54,56)

The trial court did not consider any of the above-stated background of the petitioner as non-statutory mitigating factors. (R19-20) The state had argued at the hearing, in an objection to defense examination of a psychiatrist, that the questions were not what the statute requires. (T160,162) The court, in ruling on the objection, told defense counsel to focus on the statutory aggravating and mitigating factors. (T163)

On appeal to the Supreme Court of Florida, the petitioner asked the Court to review and reweigh the evidence in mitigation (especially concerning the mitigating factor of the petitioner's impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law), arguing that the trial judge did not give adequate weight to the mitigating evidence. The Florida Supreme Court, however,

declined to review or reweigh the evidence, holding that this was not its function on appeal from a capital sentence:

> Rather, this is a case in which the appellant disagrees with the weight that the trial judge accorded the mitigating factor. But mere disagreement with the force to be given such evidence is an insufficient basis for challenging a sentence. See Hargrave v. State, 336 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979).
>
> > Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.
>
> Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981), cert denied. ___ U.S. ___, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981) (footnote omitted). (A3) (emphasis added)

In the motion for rehearing, the petitioner asked the court to reconsider its position on reviewing and reweighing evidence adduced in support of the mitigating factors. (A8) The petitioner contended that, by this recently-announced refusal to reevaluate mitigating evidence, the Florida Supreme Court had broken the promise which it had made in earlier cases to independently review and reweigh the evidence, which promise had been specifically relied upon by the United States Supreme Court in upholding the constitutionality of Florida's death sentence in Proffitt v. Florida, 428 U.S. 242, 252-253 (1976). (A8) The Florida Supreme Court's change from its independent sentence

review responsibilitites, the petitioner argued, renders Florida's death penalty unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution since the discretion of juries and judges is no longer being controlled and channeled by the appellate process, and the penalty is therefore being imposed and affirmed in an arbitrary and capricious manner. (A8) The Florida Supreme Court denied the motion for rehearing. (A12)

REASONS FOR GRANTING THE WRIT

THE REFUSAL OF THE SUPREME COURT OF FLORIDA IN A CAPITAL APPEAL TO REWEIGH AND INDEPENDENTLY EVALUATE THE EVIDENCE ADDUCED TO ESTABLISH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AS IT IS REQUIRED TO DO UNDER FLORIDA'S DEATH PENALTY SENTENCING SCHEME DENIES A DEATH-SENTENCED DEFENDANT DUE PROCESS OF LAW AND SUBJECTS HIM TO CRUEL AND UNUSUAL PUNISHMENT.

Florida's capital sentencing procedures as defined in Section 921.141, Florida Statutes (A19-20), were designed to cure the unbridled discretion in capital sentencing which this Court condemned in Furman v. Georgia, 408 U.S. 238 (1972). A key factor in this Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976), holding that the Florida statute had constitutionally cured this defect, was the role that the Florida Supreme Court played (as promised in earlier Florida decisions) in insuring that the death sentence was not imposed in an arbitrary or capricous manner.

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the

> ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (1975). See also Sullivan v. State, 303 So.2d 632, 637 (1974).

Id. at 252-253 (emphasis added).

This Court in Proffitt was relying on promises made in earlier Florida Supreme Court capital appeals wherein the state court emphasized its independent evaluation and reweighing function by referring to Florida's "trifurcated" sentencing process. See, e.g., Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

> The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment.

Alvord v. State, 322 So.2d 533, 540 (Fla. 1975). The court's responsibility to review each and every death case "to provide the convicted defendant with one final hearing before death is imposed", State v. Dixon, 283 So.2d 1, 8 (Fla. 1973) is "a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (Fla. 1975), vacated on other grounds, 430 U.S 952 (1977) (quoted in part in Proffitt v. Florida, supra, 428 U.S. at 253). In performing this responsibility, the Florida Supreme Court "evaulate[s] anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (Fla. 1978). Accord: Peek v. State, 395 So.2d 492, 500 (Fla. 1981); Vasil v. State, 374 So.2d 465, 471 (Fla. 1979); McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977); Adams v. State, 341 So.2d 765, 769 (Fla. 1977); Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975).

The jury, the judge, and the Florida Supreme Court, then, all have significant functions in determining the appropriateness of a death sentence. Such intimate involvement with the facts of a case, the credibility of witnesses, and the correctness of a sentence is a radical departure from the normal appellate function of reviewing only legal errors. Nevertheless, the Florida Supreme Court accepted this unique burden in order for the State to have a constitutional death penalty statute. In the exercise of its "review" function, the court has repeatedly found mitigating circumstances in the trial court which the trial judge did not find, and reversed death sentences in light of those findings. See e.g., Mines v. State, 390 So.2d 332, 337 (Fla. 1980); Kampff v. State, 371 So.2d 1007, 1010 (Fla. 1979); Shue v. State, 336 So.2d 387, 389-390 (Fla. 1978); Huckaby v. State, 343 So.2d 29, 33-34 (Fla. 1977); Jones v. State, 332 So.2d 615, 619 (Fla. 1976); Taylor v. State, 294 So.2d 648, 651 (Fla. 1974). To have done so is certainly to have reevaluated the evidence adduced to established aggravating and mitigating circumstances, as the court promised it would.

It now appears, however, that that burden has proven too heavy, and the State Supreme Court has unloaded itself of some of the tasks it said it would perform in capital cases. Specifically, the court has refused to reweigh evidence and conduct the independent evaluation of the evidence this Court in Proffitt said the Florida Supreme Court would do. Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). In Brown, all the Florida death row inmates challenged the Florida Supreme Court's practice of considering, in the course of reviewing sentences of death, documents which were not made available to the Defendant's counsel. In rejecting that challenge, the Florida Supreme Court said:

> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.
>
> It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court.

Id. at 1331-1332 (footnote omitted).

Quince is a victim of this retrenchment. On appeal, he asked the court, in accordance with its previous cases and with Proffitt, to independently reweigh and reevaluate the evidence adduced in support of mitigating circumstances, especially the statutory mitigating factors of mental impairment and age, and the nonstatutory factors concerning the petitioner's family background and borderline mental retardation. However, because of the Florida Supreme Court's about-face on its review function, the court refused to independently evalutate the mitigating evidence, citing the above-quoted language from Brown v. Wainwright, supra. (A3)

According to its own repeated actions and prior descriptions, and according to its promises on which this Court relied in approving Florida's death penalty, the Florida Supreme Court has never played so limited and myopic a role in capital appeals as the one which it ascribed to itself in the Brown opinion and which it has applied in the instant case. The Florida Supreme Court has broken its promises to this Court and to the people of Florida to "provide the convicted defendant with one final hearing" to determine "independently whether the

imposition of the ultimate penalty is warranted." State v. Dixon, supra at 8; Songer v. State, supra at 484. Florida has thus abandoned a crucial part of its death penalty scheme.

By refusing to independently reweigh evidence adduced in support of aggravating and mitigating factors, Florida has introduced a constitutionally unacceptable level of arbitrariness and capricousness into its capital sentencing structure. The Florida Supreme Court has refused to apply the appropriate measure of process which is due a death-sentenced defendant. See Gardner v. Florida, 430 U.S. 349 (1977).

Since the state supreme court now refuses to do what this Court in Proffitt said it must do, then this Court should re-examine Florida's death-sentencing procedures and remind the State of the promises it made in Proffitt. The petitioner's sentence as affirmed by the Florida Supreme Court is constitutionally infirm in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Upon the foregoing reasons, the petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

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